the value of its property.[14] While this increment is usually an increase in land value, it is apparent that a corresponding increase in the value due to any other similar appreciation should be classified in the same way. In the recent case, however, of *People ex rel. Kings County Lighting Co.* v. *Willcox* (1914) 210 N. Y. 479, the contention of the plaintiff gas company that the value of its property was increased by reason of the paving of the streets above the gas mains, and that this increased value should be considered in regulating its rates, was rejected. In reaching this conclusion, the court seems to have been moved principally by considerations of public interest, and held that, since the company did not own the improvement and had not brought it about by its own labor, it was not entitled to charge increased rates because of the benefit conferred at public expense.[15] The decision puts a decided limitation upon the unearned increment theory, and consequently upon the reproduction test; but the limitation of the rule is a very reasonable one, and the result reached is eminently satisfactory from a practical standpoint as fair both to the public and to the company.

ACCRETION OF CAPITAL AS A BASIS FOR DIVIDENDS.—A stock corporation is required by law to fix an arbitrary sum as its par value capital stock;[1] if its total assets exceed this sum, the excess is surplus.[2] Since it is manifestly impossible, as well as unnecessary, to trace the exact items which constitute a surplus, their designation is left to the discretion of the directors.[3] They are free to deal with all the assets of the company, in deciding what shall be treated as capital stock and what as surplus, regardless of whether the source was consideration for stock, direct earnings of the enterprise, increase in the market value of property, or a loan.[4] Until so designated, the excess is in legal contemplation simply income. When the directors have classified the total assets, they may at regular intervals[5] appropriate the surplus which appears, for any proper corporate purpose. After the usual book

[14]See Willcox *v.* Consolidated Gas Co., *supra;* Shepard *v.* Northern Pac. Ry. (C. C. 1911) 184 Fed. 765, 806.

[15]See Cedar Rapids Gas Light Co. *v.* Cedar Rapids (1909) 144 Ia. 426, affirmed in 223 U. S. 655, in which a question similar to that in the principal case was disposed of in the same way, but where it also appeared that there were unpaved alleys in the vicinity which could have been utilized for gas mains.

[1]The requirement that capital must be paid up in full implies that a sum must be named. See N. Y. Stock Corporation Law (1909) §§ 50, 65.

[2]Williams *v.* Western Union Tel. Co. (1883) 93 N. Y. 162; Barry *v.* Merchants' Exchange Co. (N. Y. 1844) 1 Sandf. Ch. 280, 307. Before finding a surplus, however, it is not necessary to make up permanent capital which has been lost, Verner *v.* General, etc. Trust., L. R. [1894] 2 Ch. 239, or sunk in a wasting property. Lee *v.* Neuchatel Asphalte Co., L. R. [1889] 41 Ch. 1.

[3]2 Cook, Corporations (6th ed) § 545.

[4]See Mackintosh *v.* Flint & P. M. R. R. (C. C. 1888) 34 Fed. 582, 604; see Lubbock *v.* British Bank of South America, L. R. [1892] 2 Ch. 198.

[5]Foster *v.* New Trinidad, etc. Asphalt Co., L. R. [1901] 1 Ch. 208.

accounts have been written off,[6] the remainder may be invested either in the original corporation[7] or in other properties;[8] it may also be called profit and made the basis of a dividend, payable to the stockholders[9] according to their contracts.[10]

Upon dissolution of the corporation, the total assets must be divided, first among the creditors and the remainder among the stockholders, as provided by the contract, or, if that be silent, by law.[11] When the business actually ceases, the power to declare a dividend fails; and since no one has a vested right in a dividend until it is declared,[12] it follows that no equity in dissolution proceedings can be inferred from a contract for sharing dividends which applies only while the concern is "going".[13] The converse must also be true, that while the concern is "going", no equity can be inferred from the expected division of assets upon dissolution.

In the recent case of *Equitable Life Insurance Co.* v. *Union Pacific R. R.* (N. Y. Supreme Ct., Equity Term, April 7, 1914), not yet reported,[14] the railroad, having an extraordinary surplus of $80,000,000 resulting in part from profitable transactions involving stock of other railroads and in part from the conversion of certain bonds into stock at a premium,[15] declared a special dividend[16] which went exclusively to the common stockholders, since the preferred stockholders had already received the four per cent "and no more" guaranteed them. The plaintiff, a preferred stockholder, while admitting the correctness of this proceeding if the surplus so divided were ordinary profit, contended that the unusual sources of this particular surplus deprived it of that character and made it "accretion of capital", *corpus* of the capital

[6]Such as depreciation, interest on debt, and losses. 2 Cook, Corporations (6th ed.) § 546.

[7]Williams *v.* Western Union Tel. Co., *supra*, p. 188.

[8]Burland *v.* Earle, L. R. [1902] A. C. 83, 95. The amount remains, of course, undivided profit.

[9]The contract usually provides that dividends shall be paid only out of profits. See Bond *v.* Barrow Haematite Steel Co., L. R. [1902] 1 Ch. 353. The law, less exactingly, merely prohibits their payment out of capital stock. See N. Y. Stock Corporation Law (1909) § 28.

[10]Hackett *v.* Northern Pac. Ry. (C. C. 1905) 140 Fed. 717.

[11]Ordinarily the stockholders of all classes share equally according to the face value of their shares. *Re* Bridgewater Navigation Co., L. R. [1891] 14 A. C. 525. By statute, preferred stockholders are sometimes preferred in the distribution of assets up to the face value of their shares; all that remains then goes to the common stock. McGregor *v.* Home Insurance Co. (1880) 33 N. J. Eq. 181.

[12]2 Cook, Corporations (6th ed.) § 534.

[13]Griffith *v.* Paget, L. R. [1877] 6 Ch. Div. 511.

[14]Affirmed unanimously by the Appellate Division, First Dept. 51 N. Y. L. J. 457.

[15]The product of a bond sale is not necessarily part of the capital stock of the enterprise. Consequently, if the bondholders by their own act reduce the company's liability on the bonds, the difference between the two sums is clear gain.

[16]Although a large part of this dividend was payable in stock of the Baltimore & Ohio Railroad, it was not technically a "stock dividend", but a distribution of property. See 2 Cook, Corporations (6th ed.) § 536.

stock, to whose distribution the rules of dissolution must apply.[17] The court, in denying him relief, was clearly right; for the source of a surplus is immaterial. Apart from the fact that a threefold division of assets into capital stock, accretion of capital stock, and surplus, is unknown in the business world, the assets here under consideration can logically be classified as surplus under the ordinary rules, and, in the absence of fraud or faulty bookkeeping, may be properly available for dividends.

[17]This same contention was advanced without success in Lubbock *v.* British Bank, *supra.* No analogy with the division of special dividends between life tenant and remainderman can be assistance here, since those cases turn either on the intent or on the date of death of a testator; these events cannot conceivably control the directors of a corporation in disposing of surplus assets.